

APPLICABLE LAWS**CHAPTER 12**

**12.1 MAGNUSON-STEVENSON FISHERY CONSERVATION AND
MANAGEMENT ACT INCLUDING ESSENTIAL FISH HABITAT**

The Essential Fish Habitat (EFH) provisions of the Magnuson-Stevens Act require NMFS to provide recommendations to Federal and state agencies for conserving and enhancing EFH if a determination is made that an action may adversely impact EFH. NMFS policy regarding the preparation of NEPA documents recommends incorporating EFH assessments into these environmental impact statements; therefore, this DEIS will also serve as an EFH assessment.

Pursuant to these requirements, Chapter 3 of this document provides a description of the alternatives considered for amending the ALWTRP. Chapter 4 provides a description of the affected environment, including the identification of areas designated as EFH (section 4.4.1), Habitat Areas of Particular Concern (section 4.4.2), and an analysis of the impacts of fishing gear on that environment (section 4.4.4). The alternatives considered will not have an adverse impact on EFH; therefore, an EFH consultation is not required. The basis for this determination is that the gear types involved, gillnet and trap/pot gear, have minimal interaction with EFH.

12.2 NATIONAL ENVIRONMENTAL POLICY ACT

This analysis was prepared in full compliance with the requirements of the National Environmental Policy Act (NEPA). All established procedures to ensure that Federal agency decision makers take environmental factors into account, including the use of a public process were followed (Exhibits 3A-1 and 3A-2). This draft environmental impact statement (DEIS) contains all the components required by NEPA, including a brief discussion of the purpose and need for the proposal (Chapter 2), the alternatives considered (Chapter 3), the environmental impacts of the proposed action and the alternatives (Chapter 5), a list of document preparers and contributors (Chapter 13), and other relevant information.

12.3 ENDANGERED SPECIES ACT

Section 7 of the Endangered Species Act requires Federal agencies conducting, authorizing, or funding activities that may affect threatened or endangered species to ensure that those impacts do not jeopardize the continued existence of listed species or result in the destruction or adverse modification of habitat determined to be critical. In 2003, NMFS was advised that the 2002 death of a female right whale (RW #3107) was an entanglement related mortality. The gear recovered from RW #3107 was consistent with gear approved for use in the U.S. lobster fishery, which provided evidence that the reasonable and prudent alternative (RPA) described in the June 14, 2001, biological opinion for this fishery was not effective at avoiding the likelihood of jeopardy to right whales. As required, the Section 7 consultation has been reinitiated to examine the effects of the lobster fishery, as modified by the existing ALWTRP and RPA measures, on right whales. This consultation is in progress.

This document analyzes the potential impacts of the alternatives considered on ESA-listed species in Chapter 5. This discussion concludes that the alternatives considered would directly benefit the ESA-listed large whales. The alternatives that would establish broad-based gear modification requirements on a seasonal basis – Alternatives 3 (Preferred), 4, or 6 (Preferred) – would vary with respect to the ancillary benefits they provide other ESA-listed species. Alternative 4, for example, would afford ancillary benefits to sea turtles migrating northward through the Mid-Atlantic from April through June. In contrast, Alternative 3 (Preferred) and Alternative 6 (Preferred) would only require the implementation of broad-based gear modifications through the end of May; thus, turtles migrating through the Mid-Atlantic in June would receive no additional protection. All of these alternatives, however, would afford sea turtles ancillary protection during their southward migration, which typically begins in September and concludes in the late fall. During this period, broad-based gear modification requirements would be in effect throughout the Mid-Atlantic. Such requirements would also be in effect in the Southeast from mid-November through mid-April, when turtle abundance in the area is greatest.

12.4 MARINE MAMMAL PROTECTION ACT

Under the Marine Mammal Protection Act (MMPA), Federal responsibility for protecting and conserving marine mammals is vested with the Departments of Commerce (NMFS) and Interior (USFWS). The primary management objective of the MMPA is to maintain the health and stability of the marine ecosystem, with a goal of obtaining an optimum sustainable population of marine mammals within the carrying capacity of the habitat. The MMPA is intended to work in cooperation with the applicable provisions of the ESA. The ESA-listed species of marine mammal that occur in the ALWTRP management areas are discussed in section 4.1 of the DEIS. The species of marine mammal not listed under the ESA that occur in the ALWTRP management areas are discussed in section 4.3.2, except minke whales, which are discussed in section 4.1.4. The potential impact of the alternatives considered on marine mammals is provided in Chapter 5.

12.5 COASTAL ZONE MANAGEMENT ACT

The Coastal Zone Management Act (CZMA) is designed to encourage and assist states in developing coastal management programs, to coordinate state activities, and to safeguard regional and national interests in the coastal zone. Section 307(c) of the CZMA requires that any Federal activity affecting the land or water uses or natural resources of a state's coastal zone be consistent with the state's approved coastal management program, to the maximum extent practicable. NMFS has determined that the implementation of each of the alternatives would be consistent to the maximum extent practicable with the approved coastal management programs of Maine, New Hampshire, Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, Georgia, and Florida. This determination will be submitted, along with a copy of this document, for review and concurrence by the responsible state agencies under Section 307 of the Coastal Zone Management Act.

12.6 ADMINISTRATIVE PROCEDURE ACT

The Federal Administrative Procedure Act (APA) establishes procedural requirements applicable to informal rulemaking by Federal agencies. The purpose of the APA is to ensure public access to the Federal rulemaking process and to give the public notice and an opportunity to comment before the agency promulgates new regulations. Specifically, the APA requires NMFS to solicit, review, and respond to public comments on actions taken in the development of take reduction plans and subsequent amendments and modifications. Development of the alternatives considered for this amendment to the Atlantic Large Whale Take Reduction Plan provided several opportunities for public review, input, and access to the rulemaking process. For example, during the public scoping process, NMFS requested suggestions and information from the public on the range of issues that should be addressed and alternatives that should be considered in the draft environmental impact statement. Summaries of the written and oral comments received during the public scoping process are provided in Exhibits 3A-1 and 3A-2, respectively.

12.7 DATA QUALITY ACT (Section 515)

The Data Quality Act directed the Office of Management and Budget to issue government wide guidelines that "provide policy and procedural guidance to federal agencies for ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by federal agencies." Under the NOAA guidelines, the Atlantic Large Whale Take Reduction Plan is considered a Natural Resource Plan. It is a composite of several types of information, including scientific, management, and stakeholder input, from a variety of sources. Compliance of this document with NOAA guidelines is evaluated below.

- **Utility:** The information disseminated is intended to describe proposed management actions and the impacts of those actions. The information is

intended to be useful to: 1) industry participants, conservation groups, and other interested parties so they can provide informed comments on the alternatives considered; and 2) managers and policy makers so they can choose an alternative for implementation.

- **Integrity:** Information and data, including statistics, that may be considered as confidential were used in the analysis of impacts associated with this document. This information was necessary to assess the biological, social, and economic impacts of the alternatives considered as required under the National Environmental Policy Act and Regulatory Flexibility Act for the preparation of a draft environmental impact statement/regulatory impact review. NMFS complied with all relevant statutory and regulatory requirements as well as NOAA policy regarding confidentiality of data. For example, confidential data were only accessible to authorized Federal employees for the performance of legally required analyses. In addition, confidential data are safeguarded to prevent improper disclosure or unauthorized use. Finally, the information to be made available to the public was done so in aggregate, summary, or other such form that does not disclose the identity or business of any person.
- **Objectivity:** The NOAA Information Quality Guidelines standards for Natural Resource Plans state that plans be presented in an accurate, clear, complete, and unbiased manner. Because take reduction plans and their implementing regulations affect such a wide range of interests, NMFS strives to draft and present proposed management measures in a clear and easily understandable manner with detailed descriptions that explain the decision making process and the implications of management measures on marine resources and the public. Although the alternatives considered in this document rely upon scientific information, analyses, and conclusions, clear distinctions would be drawn between policy choices and the supporting science. In addition, the scientific information relied upon in the development, drafting, and publication of this DEIS was properly cited and a list of references was provided. Finally, this document was reviewed by a variety of biologists, policy analysts, economists, and attorneys from the Northeast Region as well as the Headquarters office in Silver Spring, MD. In general, this team of reviewers has extensive experience with the policies and programs established for the protection of marine mammals, and specifically with the development and implementation of the ALWTRP. Therefore, this Natural Resource Plan was reviewed by technically qualified individuals to ensure that the document was complete, unbiased, objective, and relevant. This review was conducted at a level commensurate with the importance of the interpreted product and the constraints imposed by legally-enforceable deadlines.

12.8 PAPERWORK REDUCTION ACT

The alternatives considered contain collection of information requirements subject to the Paperwork Reduction Act (PRA), specifically, the marking of fishing gear. The proposed collection of information requirement was submitted to the Office of Management and Budget (OMB) for approval. Public comment is sought regarding whether this proposed collection of information is necessary for the proper performance and function of the agency, including: the practical utility of the information; the accuracy of the burden estimate; the opportunities to enhance the quality, utility, and clarity of the information to be collected; and the ways to minimize the burden of the collection of information, including the use of automated collection techniques or other forms of information technology.

The DEIS includes several alternatives that NMFS will solicit comment on during the comment period. These alternatives are analyzed separately in order to provide an estimate of burden hours (Exhibit 12-1) and cost (Exhibit 12-2) for each alternative. The labor and materials burden associated with the proposed change in gear marking requirements is based on the number of new marks per vessel required under each of the proposed alternatives and the number of vessels that would be impacted by the requirement.¹ Although the gear marking requirement is the same for all vessels (except Southeast shark gillnet vessels), burden estimates vary by alternative for two reasons: 1) differences in the number of affected vessels among alternatives; and 2) differences in the number of buoy lines allowed per trawl for lobster and other trap/pot vessels.² The number of new marks per vessel is based on the number of existing marks and the following gear configuration values:

- 1) trawls or strings per vessel;
- 2) buoy lines per trawl or per string; and
- 3) length of buoy line (based on average fishing depth).

To demonstrate the methodology described above, we present the following analysis of a typical northern inshore lobster vessel fishing on Stellwagen Bank with pairs of traps, as regulated under proposed Alternative 2. The burden hours and costs estimated in the following example are immediate; i.e., incurred within six months of publication of a final rule.

Average number of trawls (with pair traps) per vessel = 300

¹ A mark, in this instance, is a four inch blue mark once every 10 fathoms along the buoy line. The majority of fishermen already mark their buoys with the vessel number or permit number; therefore, we assume this provision places no additional costs on fishermen.

² We assume that there will be no costs to shark vessels because (1) all known shark vessels are already marking their gear in accordance with current requirements (i.e., there are no currently unregulated shark vessels that would be regulated under the proposed alternatives) and (2) shark vessels do not typically use a buoy line great than four feet. To the extent that shark vessels use longer buoy lines in cases of foul weather, those lines would have to be marked in accordance with the proposed alternatives. Such costs are not included in this cost model.

Average number of buoy lines per trawl = 1

Average number of buoy lines per vessel = $300 * 1 = 300$

Average fishing depth = 27.5 fathoms

Average length of buoy line = $27.5 \text{ fathoms} * 1.5 = 41.25 \text{ fathoms}$, where 1.5 = buoy line slack factor.

Average number of marks per buoy line = 41.25

1 mark every 10 fathoms = $(41.25 \div 10) - 1 = \text{approximately } 3 \text{ marks}$

Average number of existing marks per buoy line = 1

Average number of marks per vessel = $3 \text{ marks} * 300 \text{ buoylines} = 900 \text{ marks}$

Average number of existing marks per vessel = $1 \text{ mark} * 300 \text{ buoylines} = 300 \text{ marks}$

Number of new buoy line marks required under the proposed alternatives: $900 - 300 = 600 \text{ marks}$

Time to install a single buoyline mark = 5 minutes

Material cost of a single buoyline mark = \$0.05

Hours burden per vessel = $5 \text{ minutes} * 600 \text{ marks} = 3,000 \text{ minutes} = 50 \text{ hours}$

Material cost per vessel = $\$0.05 * 600 \text{ marks} = \30.00

The process described above is repeated for each model vessel (each model vessel represents a group of vessels that face similar regulatory requirements and operate with a similar quantity and configuration of gear). These estimates of hours burden and material costs are then multiplied by the estimated number of vessels represented by each model vessel. The resulting values for all vessel groups are then summed to estimate the total impact of each proposed alternative. Total estimated hours and material costs are then divided by total affected vessels to estimate the average hours burden and material cost per vessel.

Exhibit 12-1				
ESTIMATED ANNUAL CHANGE IN BURDEN HOURS ¹				
Proposed Alternative	Time Period ² (hours)			
	Immediate ³		Ongoing ⁴	
	Total (all vessels)	Average (per vessel)	Total (all vessels)	Average (per vessel)
1	N.A	N.A	N.A.	N.A.
2	148,185	26.3	38,638	6.9
3	147,837	26.4	38,538	6.9
4	148,182	26.4	38,637	6.9
5	148,118	26.4	38,508	6.9
6	148,118	26.4	38,508	6.9
Notes: N.A = Not Applicable ¹ The burden hours estimated in this table are incurred by fishermen in marking their buoy lines. The majority of fishermen already mark their buoys with the vessel number or permit number; therefore, we assume this provision places no additional burden on fishermen. ² Under Alternatives 2 through 4, lobster and other trap/pot vessels fishing in SAM restricted waters are limited to one buoy line per trawl. In 2008, the SAM program is eliminated and these vessels are no longer restricted to one buoy line per trawl. We assume vessels will take advantage of this change by increasing to two the number of buoy lines on all trawls over five traps. This would impact the labor burden of complying with buoy line marking requirements in 2008 and beyond. For simplicity, we only present estimated burden hours for 2005 ("Immediate") and post-2008 ("Ongoing"). ³ This estimate reflects the hours fishermen would have to spend changing current gear marking schemes to meet provisions that would go into effect six months after publication of the rule. Assuming the final rule is published in 2005, these hours would be incurred in that year. ⁴ This estimate reflects the number of hours fishermen will have to spend on an ongoing basis in order to maintain compliance with the rule. Additional time and costs are incurred on an ongoing basis because buoy lines and gear markings have useful lives, after which the gear must be replaced and/or re-marked. Assuming the final rule is published in 2005, these hours would be incurred in 2009 and every year thereafter.				

Exhibit 12-2				
ESTIMATED ANNUAL CHANGE IN COST ¹				
Proposed Alternative	Time Period ²			
	Immediate ³		Ongoing ⁴	
	Total (all vessels) (in thousands of dollars)	Average (per vessel) (in dollars)	Total (all vessels) (in thousands of dollars)	Average (per vessel) (in dollars)
1	N.A.	N.A.	N.A.	N.A.
2	\$ 88.9	\$ 15.78	\$ 23.2	\$ 4.12
3	\$ 88.7	\$ 15.82	\$ 23.1	\$ 4.12
4	\$ 88.9	\$ 15.81	\$ 23.2	\$ 4.12
5	\$ 88.9	\$ 15.85	\$ 23.1	\$ 4.12
6	\$ 88.9	\$ 15.85	\$ 23.1	\$ 4.12
Notes: N.A.= Not Applicable ¹ The costs estimated in this table are incurred by fishermen in marking their buoy lines. The majority of fishermen already mark their buoys with the vessel number or permit number; therefore, we assume this provision places no additional costs on fishermen. ² Under Alternatives 2 through 4, lobster and other trap/pot vessels fishing in SAM restricted waters are limited to one buoy line per trawl. In 2008, the SAM program is eliminated and these vessels are no longer restricted to one buoy line per trawl. We assume vessels will take advantage of this change by increasing to two the number of buoy lines on all trawls over five traps. This would impact the cost of complying with buoy line marking requirements in 2008 and beyond. For simplicity, we only present costs for 2005 ("Immediate") and post-2008 ("Ongoing"). ³ This estimate reflects the cost to fishermen of changing current gear marking schemes to meet provisions that would go into effect six months after publication of the rule. Assuming the final rule is published in 2005, these costs would be incurred in that year. ⁴ This estimate reflects cost to fishermen on an ongoing basis in order to maintain compliance with the rule. Additional time and costs are incurred on an ongoing basis because buoy lines and gear markings have useful lives, after which the gear must be replaced and/or re-marked. Assuming the final rule is published in 2005, these costs would be incurred in 2009 and every year thereafter.				

12.9 EXECUTIVE ORDER 13132 - FEDERALISM

EO 13132, otherwise known as the Federalism EO, was signed by President Clinton on August 4, 1999, and published in the *Federal Register* on August 10, 1999 (64 FR 43255). This EO is intended to guide Federal agencies in the formulation and implementation of "policies that have federal implications." Such policies are regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. EO 13132 requires Federal agencies to have a process to ensure meaningful and timely input by state and local officials in the development of regulatory policies that have federalism implications. A Federal summary impact statement is also required for rules that have federalism implications.

EO 13132 establishes fundamental federalism principles based on the U.S. Constitution, specifies federalism policy making criteria, and special requirements for preemption of state law. For example, a Federal action that limits the policy making discretion of a state is to be taken only where there is constitutional and statutory authority for the action and it is appropriate in light of the presence of a problem of national significance. In addition, where a Federal statute

does not have expressed provisions for preemption of state law, such a preemption by Federal rule making may be done only when the exercise of state authority directly conflicts with the exercise of Federal authority. To preclude conflict between state and Federal law on take reduction plans, the Marine Mammal Protection Act explicitly establishes conditions for federal preemption of state regulations. Furthermore, close state-Federal consultation on fishery management measures implemented under the ALWTRP is provided by the take reduction team process. The implementation of any of the alternatives considered would contain policies with federalism implications sufficient to warrant the preparation of a federalism assessment under EO 13132. Therefore, the Assistant Secretary for Legislative and Intergovernmental Affairs will provide notice of the action to the appropriate official(s) of affected state, local and/or tribal governments.

12.10 EXECUTIVE ORDER 12866

The requirements for all regulatory actions specified in EO 12866 are summarized in the following statement from the order:

In deciding whether and how to regulate, agencies should assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating. Costs and benefits shall be understood to include both quantifiable measures (to the fullest extent that these can be usefully estimated) and qualitative measures of costs and benefits that are difficult to quantify, but nevertheless essential to consider. Further, in choosing among alternative regulatory approaches, agencies should select those approaches that maximize net benefits (including potential economic, environment, public health and safety, and other advantages; distributive impacts; and equity), unless a statute requires another regulatory approach.

The analysis meeting the above described requirements of the EO are found in the section entitled Regulatory Impact Review (RIR), which is included with this DEIS in Chapter 10.

12.11 REGULATORY FLEXIBILITY ACT

The Regulatory Flexibility Act (RFA) was enacted in 1980 to place the burden on the Federal government to review all regulations to ensure that, while accomplishing their intended purposes, they do not unduly inhibit the ability of small entities to compete. The RFA emphasizes predicting significant adverse impacts on small entities as a group distinct from other entities and on the consideration of alternatives that may minimize the impacts while still achieving the stated objective of the action. When an agency publishes a proposed rule, unless it can provide a factual basis upon which to certify that no such adverse effects will accrue, it must prepare and make available for public review an Initial Regulatory Flexibility Analysis (IRFA) that describes the impact of the proposed rule on small entities. An IRFA for this action is provided in Chapter 11.

12.12 EXECUTIVE ORDER 12898 – ENVIRONMENTAL JUSTICE

The Environmental Protection Agency (EPA) defines environmental justice as, “the fair treatment for all people of all races, cultures, and incomes, regarding the development of environmental laws, regulations, and policies.” EO 12898 was implemented in response to the growing need to address the impacts of environmental pollution on particular segments of our society. This order requires each Federal agency to achieve environmental justice by addressing “disproportionately high and adverse human health and environmental effects on minority and low-income populations.” In furtherance of this objective, the EPA developed an Environmental Justice Strategy that focuses the agency’s efforts in addressing these concerns. For example, to determine whether environmental justice concerns exist, the demographics of the affected area should be examined to ascertain whether minority populations and low-income populations are present, and, if so, a determination must be made as to whether implementation of the alternatives may cause disproportionately high and adverse human health or environmental effects on these populations. Environmental justice concerns typically embody pollution and other environmental health issues, but the EPA has stated that addressing environmental justice concerns is consistent with NEPA; therefore, all Federal agencies are required to identify and address these issues. Many of the participants in the fisheries regulated under the ALWTRP may come from lower income and/or ethnic minority populations. These populations may be more vulnerable to the management measures considered in this document. However, the economic and social impact analyses performed for the EIS suggest that a relatively small segment of regulated vessels will incur significant cost impacts relative to annual revenues. Chapter 7 describes the demographic and economic characteristics of the regions where affected vessels are based and examines the features of heavily affected vessel groups.

12.13 EXECUTIVE ORDER 13158 – MARINE PROTECTED AREAS

EO 13158 requires each Federal agency whose actions affect the natural or cultural resources that are protected by a Marine Protected Area (MPA) to identify such actions, and, to the extent permitted by law and to the extent practicable, avoid harm to the natural and cultural resources that are protected by an MPA. EO 13158 promotes the development of MPAs by enhancing or expanding the protection of existing MPAs and establishing or recommending new MPAs. The EO defines an MPA as “any area of the marine environment that has been reserved by Federal, State, territorial, tribal, or local laws or regulations to provide lasting protection for part or all of the natural and cultural resources therein.”

Pursuant to this order, the Departments of Commerce and the Interior are jointly developing a list of MPAs that meet the definition. To date, the list of MPA sites has not been developed by the departments. However, a marine managed area inventory is being developed, which will then be used to form a pool from which sites may later be considered for placement on the list of MPAs, as well as for scientific analyses. It is likely that when the MPA list is completed the Stellwagen Bank National Marine Sanctuary, Northern right whale critical habitats (Cape Cod Bay and Great South Channel), and year round closed areas for groundfish (Closed Area I, Closed Area II, Nantucket Lightship Closed Area, and Western Gulf of Maine Closed Area), at a minimum, will meet the criteria for being listed as an MPA.